LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
SEP 1 196
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. 399

JAMES FIELDS, *et al.*,

Petitioners,

—v.—

STATE OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

JACK GREENBERG
CONSTANCE BAKER MOTLEY
MICHAEL MELTSNER
10 Columbus Circle
New York 19, New York

MATTHEW J. PERRY
LINCOLN C. JENKINS, JR.
1107½ Washington Street
Columbia 1, South Carolina

W. NEWTON POUGH
Orangeburg, South Carolina

Attorneys for Petitioners

INDEX

	PAGE
Citation to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision Involved	3
Statement	3
How the Federal Questions Were Raised and Decided Below	10
Reasons for Granting the Writ	15
I. This petition presents issues identical to those pending before this Court in another case which the court below cited as authority for its judgment	15
II. Petitioners' conviction on warrants charging that their conduct "... caused fear and tending to incite a riot or other disorderly conduct or cause serious trouble" violates petitioners' rights as guaranteed by the Due Process clause of the Fourteenth Amendment in that their conviction rests on no evidence of guilt	18
III. Petitioners' convictions were obtained in violation of their rights to freedom of speech and assembly in that they were convicted of breach of the peace without proof of a substantial evil that rises far above public	

PAGE

inconvenience, annoyance, and unrest and without proof of a clear and present danger that serious injury to the state would occur 21

CONCLUSION 25

APPENDIX 1a

Order of the Orangeburg County Court in *State* v. *Fields* 1a

Opinion of the Supreme Court of South Carolina in *State* v. *Fields* 4a

Order of the Orangeburg County Court in *State* v. *Gilchrist* 5a

Opinion of the Supreme Court of South Carolina in *State* v. *Gilchrist* 7a

Order of the Orangeburg County Court in *State* v. *Graham* 8a

Opinion of the Supreme Court of South Carolina in *State* v. *Graham* 10a

Order of the Orangeburg County Court in *State* v. *Witherspoon* 11a

Opinion of the Supreme Court of South Carolina in *State* v. *Witherspoon* 13a

Order of the Orangeburg County Court in *State* v. *Heatley* 14a

PAGE

Opinion of the Supreme Court of South Carolina in *State* v. *Heatley* 15a

Order of the Orangeburg County Court in *State* v. *J. Brown* 16a

Opinion of the Supreme Court of South Carolina in *State* v. *J. Brown* 17a

Order of the Orangeburg County Court in *State* v. *Davenport* 18a

Opinion of the Supreme Court of South Carolina in *State* v. *Davenport* 19a

Order of the Orangeburg County Court in *State* v. *Irene Brown* 20a

Opinion of the Supreme Court of South Carolina in *State* v. *Irene Brown* 29a

Table of Cases

Cantwell v. Connecticut, 310 U. S. 296 ..... 21, 23, 25

Cooper v. Aaron, 358 U. S. 1 22

Feiner v. New York, 300 N. Y. 391, 91 N. E. 2d 319, aff'd, 340 U. S. 315 ..... 12, 22

Garner v. Louisiana, 368 U. S. 157 ..... 20, 21, 24

Hague v. C. I. O., 307 U. S. 496 23

Robeson v. Fanelli, 94 F. Supp. 62 (S. D. N. Y. 1950) 23

Rockwell v. Morris, 10 N. Y. 2d 721 (1961), cert. den. 7 L. ed. 2d 131 22

PAGE

Sellers v. Johnson, 163 F. 2d 877 (8th Cir. 1947), cert. den. 332 U. S. 851 ..... 22, 23
Shelley v. Kraemer, 334 U. S. 1 17
State v. Irene Brown, —— S. C. ——, 126 S. E. 2d 1 ..... 2, 4, 12, 13, 15
State v. Edwards, —— S. C. ——, 123 S. E. 2d 247, cert. granted May 14, 1962 ..... 14, 15, 16, 17, 24
Taylor v. Louisiana, 7 L. ed. 2d 395 ..... 20, 21
Terminiello v. Chicago, 337 U. S. 1 22
Thompson v. Louisville, 362 U. S. 199 ..... 20, 21
Thornhill v. Alabama, 310 U. S. 88 25
Trustees of Monroe Ave. Church of Christ v. Perkins, 334 U. S. 813 17
Whitney v. California, 274 U. S. 357 21

IN THE

Supreme Court of the United States

October Term, 1962

No. .....

JAMES FIELDS, *et al.*,

Petitioners,

—v.—

STATE OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Petitioners pray that a writ of certiorari issue to review the judgments of the Supreme Court of South Carolina entered in the cases of the *State* v. *James Fields, et al.;* the *State* v. *Bobbie J. Gilchrist, et al.;* the *State* v. *Marie Graham, et al.;* the *State* v. *Eula M. Witherspoon, et al.;* the *State* v. *Alvin Heatley, et al.;* the *State* v. *Joseph C. Brown, et al.;* and the *State* v. *Frances E. Davenport, et al.,* entered on June 6, 1962.

Citation to Opinions Below

The opinions of the Supreme Court of South Carolina, which opinions are the final judgments of the Court, are reported at 126 S. E. 2d 6, 7, 8, 9 (1962) and are set forth in the appendix hereto (Fields 4a; Gilchrist 7a; Graham 10a; Witherspoon 13a; Heatley 15a; J. Brown 17a; Davenport 19a). The opinions of the Orangeburg County Court are unreported and are set forth in the appendix hereto (Fields 1a; Gilchrist 5a; Graham 8a; Witherspoon 11a;

Heatley 14a; J. Brown 16a; Davenport 18a). The opinion of the South Carolina Supreme Court reported at 126 S. E. 2d 1 (1962) and the opinion of the Orangeburg County Court in the case of the *State* v. *Irene Brown, et al.*, filed simultaneously with, and cited as controlling authority for, the opinions in petitioners' cases are set forth in the appendix hereto, *infra*, pp. 20a-37a.

Jurisdiction

The judgments of the Supreme Court of South Carolina were entered June 6, 1962 (Fields 4a; Gilchrist 7a; Graham 10a; Witherspoon 13a; Heatley 15a; J. Brown 17a; Davenport 19a).

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1257(3), petitioners having asserted below and asserting here deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Questions Presented

Whether petitioners were denied due process of law as secured by the Fourteenth Amendment to the Constitution of the United States:

1. When convicted of the crime of common law breach of peace on warrants charging that their conduct, a peaceful and orderly walk, the purpose of which was to express opposition to racial segregation and suppression of the freedom of speech in Orangeburg, South Carolina, "caused fear", "tend[ed] to incite a riot or other disorderly conduct" or "cause[d] serious trouble" on a record barren of evidence of threatened, imminent or actual violence or disorder of any kind.

2. When convicted of the crime of common law breach of peace on the ground that their conduct, peaceful and orderly exercise of their rights of free speech and assembly, allegedly produced community tension and need for minor traffic adjustment.

Constitutional Provision Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Statement

Petitioners, three hundred seventy-three Negro students, were tried in seven separate trials from March 19, 1960 to May 7, 1960. Petitioners, along with other students from the Orangeburg area, began to walk in four separate groups toward the downtown area of Orangeburg, South Carolina to demonstrate their dissatisfaction with racial segregation in the City and State (Heatley 103; Gilchrist 73; Fields 127; Witherspoon 103). Three hundred eighty-eight students were arrested and charged with the crime of common law breach of the peace (Fields 1-2; Gilchrist 1-2; Graham 1-2; Witherspoon 1-2; Heatley 1-2; J. Brown 1-2; Davenport 1-2). All were convicted in the Magistrate's Court of the County of Orangeburg, sitting without a jury, and sentenced each to pay fines of fifty ($50.00) dollars or serve 30 days in prison (Fields 137; Gilchrist 91; Graham 7; Witherspoon 132; Heatley 123; J. Brown 6; Davenport 7).

On appeal to the First Judicial Circuit of South Carolina and later to the Supreme Court of South Carolina, the cases were consolidated for argument and the convictions were affirmed. Identical constitutional and state law questions

were raised in each case. In a companion case, *State v. Irene Brown, infra* 20a-37a, a jury trial in the Magistrate's Court resulted in the conviction of fifteen students for common law breach of the peace. This conviction was, however, reversed by the Supreme Court of South Carolina on the grounds that examination of prospective jurors on the *voir dire* had been denied by the trial court *infra* 36a, 37a.

It was stipulated below that the records of the proceedings in the cases of *J. Brown, et al., Davenport, et al.*, and *Graham, et al.*, would be the same as the record in *Heatley, et al.* (J. Brown 5; Davenport 5; Graham 5).

The students were charged on warrants alleging that they

> "did commit breach of the peace by unlawfully and willfully congregating and marching in the City of Orangeburg, said County, and did approach what is known as the business section of the City of Orangeburg, the groups being headed by a number of parties who refused to stop and return to the colleges upon the request of Chief of Police Hall and other officers in the City of Orangeburg, thereby disturbing the peace and tranquility of the normal traffic on the sidewalks as well as the streets in the City of Orangeburg, which caused fear and tending to incite a riot or other disorderly conduct or cause serious trouble, thereby committing breach of the peace, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

(Fields 1-2; Gilchrist 2; Graham 2; Heatley 2; Witherspoon 2; J. Brown 2; Davenport 2.)

These records reveal that four groups of students were arrested by the police. For convenience of presentation the

factual circumstances of each set of arrests have been set forth separately. Facts in common are set forth, *infra* at p. 8.

The Amelia Street Groups

First Group

At about 12 noon on March 15, 1960, seventy-five to one hundred Negro students walked in a westerly direction on Amelia Street (Heatley 7). Their purpose was to protest against discriminatory practices in the City and State (Gilchrist 64-65, Heatley 92-93). The group was stopped by two police officers one of whom asked for the spokesman of the group (Heatley 7). The spokesman was immediately arrested. The police officer then requested the spokesman to ask the group to disperse, and he complied. When no one moved, the police officer himself asked the group to move (Heatley 7). Some students did not hear this request (Gilchrist 71; Witherspoon 111-112). When the group still did not move all were placed under arrest (Heatley 7). None resisted (Heatley 122).

One police officer testified that the public safety and the normal traffic would be disrupted if the students were allowed to continue (Heatley 65). However, the students were peaceful and orderly (Heatley 87) as were the onlookers (Gilchrist 53). No vehicular traffic was blocked (Fields 64; Gilchrist 29; Witherspoon 21). Though the sidewalks are narrow (Gilchrist 33) pedestrian traffic was light at that time of day (Gilchrist 29) and no one was inconvenienced in his use of the sidewalks (Gilchrist 29; Fields 63).

Second Group

The second group on Amelia Street was proceeding at some distance behind the first when stopped by the same two officers who had arrested the first group. The second group numbered about fifty to seventy-five (Gilchrist 27). The circumstances of this arrest were the same as the first (Heatley 9-10).

Russell Street Group

On the same day, March 15, 1960, two groups of students proceeded on Russell Street in the direction of the downtown area in Orangeburg, South Carolina (Gilchrist 8). There were some three hundred to four hundred students in the group (Gilchrist 9). They were stopped by police officers and ordered to disperse (Gilchrist 7). When the students refused, fire hoses were turned on the group and tear gas thrown (Heatley 34; Fields 20). The fire truck had been summoned by the police before they went to meet the students (Fields 41). Four of the students were arrested.

The petitioners were orderly (Fields 42, 49). There is testimony that fifteen or twenty persons other than the students were walking on the sidewalk (Heatley 39).

Traffic in the streets was tied up (Gilchrist 9) by fire hoses strung across the street (Fields 43). No traffic was blocked before the fire hoses were placed in the street (Fields 43).

The students themselves remained on the sidewalks (Gilchrist 14). The Chief of Police testified they used the entire sidewalks but did not see anyone forced to walk into the streets or prevented from using the sidewalk (Fields 47). The Chief of Police testified that the reason for the arrests was that the students had been told not to demonstrate (Fields 47).

John Calhoun Drive and Middleton Street Group

As this group of seventy-five to one hundred (Heatley 44) proceeded along John Calhoun Drive (also known as Highway 301 and Highway 601) they were stopped by a police officer. When he ordered them to disperse, the students refused. Asked by a member of their group if they wished to continue, they replied in the affirmative (Heatley 45). The students continued on down the street, the police officer accompanying them, and turned right on Middleton Street. As they neared St. John Street, they were stopped by another officer and told to disperse (Heatley 60). When they refused they were arrested (Heatley 45).

This group, like the others, was well behaved (Fields 92; Gilchrist 39; Witherspoon 79). There was no evidence of disorder among twelve to fifteen persons gathered on the side of Middleton Street opposite the one on which the petitioners were walking nor among the persons gathered near St. John Street. Both groups moved when requested to do so by the police (Fields 77, 84; Gilchrist 34; Witherspoon 55).

There was no blocking of vehicular or pedestrian traffic on John Calhoun Drive (Heatley 48-51; Gilchrist 39-40). Some motorists stopped of their own accord (Fields 82). Patrolman E. A. Brant of the Orangeburg Police Department testified that the students covered the sidewalk on John Calhoun Drive (Fields 87; Gilchrist 44) but the same officer testified that the students walked in pairs (Gilchrist 39) and that no pedestrians were prevented from passing (Heatley 48-51; Gilchrist 40).

Officer Brant testified that "Traffic had stopped on the right side [of Middleton Street] where cars could not go

through" (Witherspoon 57, 71). However he also testified that the students themselves blocked no traffic on Middleton Street (Witherspoon 71; Heatley 51). Nor did he, while walking in the street (Witherspoon 67), block any cars himself (Heatley 51). The sidewalk on Middleton Street is wide enough for only two persons to pass (Gilchrist 35, 41). Patrolman Brant testified that pedestrians were unable to use the sidewalks (Fields 83) but he gave no evidence of any actual meeting of the pedestrians and students. The pedestrians he observed were going into places of business on the street (Gilchrist 35; Heatley 45; Witherspoon 56).

The arresting officer testified in two trials that the students, as they proceeded along Middleton Street, were on the sidewalk (Fields 92; Gilchrist 43). In a third he testified that two students were at the edge of the curb but they were not in the middle of the street, nor did they block any traffic (Witherspoon 77). He testified at one point that pedestrians were blocked from the use of the sidewalk (Witherspoon 77), but he changed this testimony to say that, as the students were walking toward him, two abreast, he asked several pedestrians to step aside (Witherspoon 77, 78). He added that no pedestrians were blocked by the students (Witherspoon 79). One of the students supported this view (Fields 126-127).

Facts in Common

All of the cases have significant facts in common. Each group of students attempted to walk into town to register its protest against racial segregation. Each group was orderly. The students themselves did not prevent traffic from passing. The reasons given for the arrests, other than walking without a permit and failure to disperse, were that

the community was tense (Gilchrist 10, 26; Heatley 60; Witherspoon 74) and that the students had no right to hold a demonstration (Heatley 34). There is no evidence that the police had received any information concerning violence on the day of the arrests. The police based their conclusion on three demonstrations which had taken place prior to the date of the arrests and on talks with several people in the community. On February 25th students had picketed the Kress Dime Store and no disturbance had taken place (Gilchrist 12). On February 26th a white and a Negro had been arrested for a brief "fisticuff" during a sit-in at the same store (Fields 15; Gilchrist 12). This was the only instance of violence involving the students before the date of their arrests. On March 1st six hundred to seven hundred Negro students walked through town. Two people were arrested on that day "from incidents that happened during the parading," and four boys were also arrested apparently for having had paper bags over their heads (Heatley 66). From this and the statements of persons in the community, the police concluded that the town was tense (Fields 17). The Chief of Police talked to between ten and fifteen people (Fields 33). These people voiced no hostile objections nor did they suggest that they were going to employ force to stop demonstrations (Fields 31, 39). The Assistant Chief of the South Carolina Law Enforcement Division talked to thirty or forty people (Witherspoon 50). Some expressed their feelings in a "belligerent manner" (Witherspoon 48) but none expressed a purpose of doing violence themselves (Witherspoon 50). "They were afraid of what somebody else might do" (Witherspoon 50). People who feared a disturbance never said from what source it might come (Heatley 43). Other evidences of "tension" were found in the fact that people "would simply want to know what was going on around there at Kress' Five and Ten Cents Store" (Witherspoon 29). There were no threats

(Witherspoon 29). On the day of the arrests there was no evidence of violence or threatened violence.

There is no evidence of any kind that any of the groups of students blocked traffic or interfered with pedestrians. Whatever interference with traffic or pedestrians which was caused seems to have been a result of police conduct (Fields 20, 40, 43, 47, 63, 64, 77, 84; Heatley 34, 48-51; Witherspoon 21, 67, 71, 77, 78; Gilchrist 29). The few pedestrians in the area of the demonstration seem to have been curious onlookers rather than persons blocked from reaching some specific destination (Heatley 45; Witherspoon 55, 56, 77, 78, 79; Gilchrist 34, 35, 40).

How the Federal Questions Were Raised and Decided Below

The petitioners in these seven cases were tried before the Court of Magistrate, Orangeburg County, in seven separate trials on the 28th (Fields) and 31st (Gilchrist) of March, the 5th (Witherspoon), 8th (Heatley), 22nd (J. Brown), and 28th (Davenport) of April, and the 7th (Graham) of May, 1960.

Prior to entry of their pleas in most cases, petitioners moved to dismiss on the ground that prosecution for the offense charged in the circumstances alleged would constitute a denial of due process of law under the Fourteenth Amendment to the Constitution of the United States (Fields 8; Witherspoon 5; Heatley 5; J. Brown 5; Davenport 4-5; Graham 5). These motions were denied (Fields 8; Witherspoon 5; Heatley 5; J. Brown 5; Davenport 5; Graham 5). In the *Gilchrist* case, petitioners objected specifically to denial of their freedom of expression and peaceful assembly in their pleas of not guilty:

"At the time of the arrest of each of these defendants, he or she was engaging in a lawful assemblage of persons who were proceeding to a designated place in the city of Orangeburg, South Carolina, for the purpose of expressing grievances and for the purpose of petitioning officials of the City, County and State Governments for the redress of grievances.

* * * * *

"Each defendant pleads not guilty to whatever crime, if any, the information alleges, for the reason that the right to engage in the activity in which the defendants were engaged is protected by . . . the First and Fourteenth Amendments to the United States Constitution" (Gilchrist 6).

Similarly worded pleas were entered in other cases (Fields 12-13; Witherspoon 5-6).

Motions to dismiss on similar grounds were also made at the close of the prosecution's case (Heatley 89; J. Brown 7; Davenport 6; Graham 6-7) and prior to entry of judgment (Fields 135; Gilchrist 91; Witherspoon 130, 131; Heatley 122; J. Brown 7; Davenport 6; Graham 6-7).

In all cases, after judgment of guilty and sentence, motions in arrest of judgment or in the alternative for a new trial were made on the grounds *inter alia* that the evidence established that the students were prosecuted only "for the purpose of preventing them from engaging in peaceful assembly" to protest against racially discriminatory practices of the community, "contrary to the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution" (Witherspoon 132-33; Heatley 122, 124; J. Brown 7; Davenport 7; Graham 7) and that the evidence showed conclusively that at the time of their arrests the students were included in

a peaceful and lawful assemblage of persons and were orderly in every respect (Fields 139; Gilchrist 93; Witherspoon 134). These motions were all denied by the trial Court (Fields 135, 139; Gilchrist 91, 93; Witherspoon 131, 132, 134; Heatley 89, 123, 124; J. Brown 7; Davenport 7; Graham 7).

Petitioners appealed in all seven cases; as did the defendants in the companion case of *State* v. *Irene Brown* (Appendix 20a), to the Orangeburg County Court, where arguments on the eight appeals, involving several identical issues, were heard together. The County Court affirmed all eight convictions (Appendix 1a, 5a, 8a, 11a, 14a, 16a, 18a, 20a), issuing eight separate orders. The orders of the County Court in the seven cases involving petitioners here relied primarily and directly (3a, 6a, 9a, 12a, 14a, 16a, 18a) on the order rendered in *State* v. *Irene Brown* (20a) in which the County Court dealt with the Constitutional issues raised at trial:

> "Exception number nine relates to a general reservation of any and all rights asserted at trial on behalf of these defendants. It was urged in the arguments before me and in the brief submitted by the Appellants that they had a constitutional right to engage in the activities for which they were arrested, regardless of any peril to the community which might result therefrom. The relevant constitutional provisions are asserted as the Thirteenth and Fourteenth Amendments to the Constitution of the United States . . ." (25a).

On the authority of *Feiner* v. *New York*, 300 N. Y. 391, 91 N. E. 2d 319, the County Court held that "no action was taken until the police authorities in their considered judgment came to the conclusion that the point had been reached where the action of the Appellants was dangerous to the

peace of the community" (27a). It was also said that the police acted "to avoid a clear and present danger to the public order" (22a).

Petitioners appealed to the Supreme Court of the State of South Carolina, again with the defendants in *State* v. *Irene Brown*, excepting to the judgment below as follows:

> "4. The Court erred in refusing to hold that appellants were convicted upon a record devoid of any evidence of the commission of any of the essential elements of the crime charged, in violation of appellants' right to due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution . . ." (Fields 143; Gilchrist 97; Witherspoon 138; Heatley 127; Joseph C. Brown 9; Graham 10; Davenport 9).
>
> "6. The Court erred in refusing to hold that the evidence shows conclusively that by the arrest and conviction of appellants, the State of South Carolina used its police powers to deprive appellants of the right of freedom of assembly and the right of freedom of speech, guaranteed them by the First Amendment to the United States Constitution, and further secured to them under the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States" (Fields 143; Gilchrist 97; Witherspoon 138-39; Heatley 127-28; J. Brown 9-10; Davenport 10; Graham 11).

Before the Supreme Court of South Carolina the eight cases were consolidated for argument "because all of the cases involve[d] basically the same issues and facts" (29a). The Supreme Court affirmed the seven cases involved here (4a, 7a, 10a, 13a, 15a, 17a, 19a) on the express authority of its opinion in *State* v. *Irene Brown* (29a), in which the constitutional issues were decided adversely to defendants, al-

though that case was reversed on an issue not presented in the other cases. In the case of Irene Brown, the Supreme Court of South Carolina said:

> "The defendants next assert that the State failed to prove the commission by them of the offense of breach of peace and that their convictions were obtained in violation of their rights to freedom of speech and assembly and their right to petition for redress of grievances, protected by . . . the First and Fourteenth Amendments to the United States Constitution. All of these questions may be resolved by a determination of whether or not there is any competent evidence to sustain the conviction of the defendants for a breach of the peace" (30a-31a).

Upon the authority of *State* v. *Edwards*, —— S. C. ——, 123 S. E. 2d 247, No. 86, October Term, 1962, *cert. granted*, May 14, 1962, which had in turn relied upon *Feiner* v. *New York*, 340 U. S. 315, affirming, 300 N. Y. 391, 91 N. E. 2d 319, the Supreme Court of South Carolina held in the case of Irene Brown that:

> "The constitutional guarantees which, admittedly, the defendants have a right to enjoy may not be asserted in any manner, regardless of any resulting peril to the community therefrom. The constitutional principles here invoked do not prohibit state action when a clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public peace or order appears" (34a).

After equating the constitutional standard with guilt of the crime charged the Court determined that, "the evidence amply sustains the conviction of the defendants of the offense of breach of the peace" (30a, 31a, 33a, 36a).

Reasons for Granting the Writ

I

This Petition Presents Issues Identical to Those Pending Before This Court in Another Case Which the Court Below Cited as Authority for Its Judgment.

This petition presents for decision issues identical to those pending before this Court in *Edwards* v. *State of South Carolina*, No. 86, October Term, 1962, certiorari granted May 14, 1962.

The Supreme Court of South Carolina affirmed petitioners' convictions on the authority of its opinion in a companion case, in which review is not sought in this petition, *State* v. *Irene Brown, et al.* (29a), stating in each case "Under basically the same facts, the identical issues were presented in the case of *State* v. *Irene Brown, et al.* and decided adversely to the contentions of these defendants" (4a; 7a; 10a; 13a; 15a; 17a; 19a).

In *Brown, supra*, as in petitioners' cases, the defendants argued "that the State failed to prove the commission by them of the offense of breach of the peace and that their convictions were obtained in violation of their rights to freedom of speech and assembly and their right to petition for redress of grievances, protected by . . . the First and Fourteenth Amendments to the United States Constitution" (30a, 31a). The Supreme Court of South Carolina rejected these contentions and in so doing relied on its decision in *State* v. *Edwards*, —— S. C. ——, 123 S. E. 2d 247, petition for writ of certiorari granted May 14, 1962.

In rejecting the defendants' contentions in *Brown, supra*, and therefore, in petitioners' cases, the Supreme Court of South Carolina held "the evidence is clear that the officers

were motivated solely by a proper concern for the preservation of order and the protection of the general welfare in the face of actual interference with traffic, and an imminently threatened disturbance of the peace of the community" (36a).

In dealing with identical contentions that the State had failed to prove the offense of breach of the peace and that conviction was obtained in violation of rights to free speech and assembly protected by the Fourteenth Amendment, the Supreme Court of South Carolina in *State* v. *Edwards*, —— S. C. ——, 123 S. E. 2d 247, petition for writ of certiorari granted May 14, 1962, stated:

> "The orders of the police officers under all the facts and circumstances were reasonable and motivated solely by a proper concern for the preservation of order and prevention of further interference with traffic upon the public streets and sidewalks."

In *Edwards, supra*, the questions presented by the petition were:

> Whether petitioners were denied due process of law as secured by the Fourteenth Amendment to the Constitution of the United States:
>
> 1. When convicted of charges that their conduct, which was an assembly to express opposition to racial segregation on the State House grounds, "tended directly to immediate violence and breach of the peace" on a record containing no evidence of threatened, imminent, or actual violence.
>
> 2. When convicted of the common law crime of breach of the peace because exercise of their rights of free speech and assembly to petition for a redress of

grievances allegedly "tended" to result in unlawful conduct on the part of other persons opposing petitioners' views.

Identical issues are presented by the petition in the instant cases. See Questions Presented, *supra* at pp. 2-3.

The facts in *Edwards* and the instant cases are similar and, indeed, as far as legal consequences are concerned, the cases are identical. Both *Edwards* and the instant cases arose out of attempts to express dissatisfaction with the racial policies of the State of South Carolina. See Petition for Writ of Certiorari in *State* v. *Edwards*, filed March 27, 1962, p. 3; *supra*, p. 3. Petitioners in *Edwards* and in these cases were charged with and convicted of the crime of common law breach of the peace. See Petition in *Edwards*, p. 3; *supra*, p. 4. In *Edwards* and in the instant cases, arrest and conviction was upheld by the same State Supreme Court on the grounds that petitioners' expression was dangerous to the peace of the community and disruptive of traffic conditions. See Petition in *Edwards*, p. 15a; *infra*, pp. 34a, 38a. Finally, *Edwards* was cited as authority by the Supreme Court of South Carolina for affirmance of the instant cases, *infra*, pp. 30a, 33a.

Where a petition for certiorari presents questions identical with, or similar to, issues already pending before this Court in another case in which certiorari has been granted, the issues involved in the petition are obviously appropriate for review by certiorari. Compare *Trustees of Monroe Ave. Church of Christ* v. *Perkins*, 334 U. S. 813 with *Shelley* v. *Kraemer*, 334 U. S. 1.

II

Petitioners' Conviction on Warrants Charging That Their Conduct "... Caused Fear and Tending to Incite a Riot or Other Disorderly Conduct or Cause Serious Trouble" Violates Petitioners' Rights as Guaranteed by the Due Process Clause of the Fourteenth Amendment in That Their Conviction Rests on No Evidence of Guilt.

Petitioners were convicted of common law breach of the peace upon warrants alleging that they (Fields 1-2; Gilchrist 2; Graham 2; Witherspoon 2; Heatley 2; Davenport 2)

> ... did commit breach of the peace by unlawfully and wilfully congregating and marching in the City of Orangeburg, said County, and did approach what is known as the business section of the City of Orangeburg, the groups being headed by a number of parties who refused to stop and return to the colleges upon the request of Chief of Police Hall and other officers in the City of Orangeburg, thereby disturbing the peace and tranquility of the normal traffic on the sidewalks as well as the streets in the City of Orangeburg, which caused fear and tending to incite a riot or other disorderly conduct or cause serious trouble, thereby committing breach of the peace ...

There is no evidence in these records that petitioners' conduct "caused fear", tended "to incite a riot or other disorderly conduct" or caused "serious trouble" of any kind as alleged in the warrants. The students were at all times peaceful, orderly, well-dressed and well demeaned (see *supra* at pp. 5, 7). The records reveal no instance of act or word which might in any manner have caused violence. Absent from these records are signs of disorder or potential disorder such as threatening remarks, hostile gestures,

pushing, milling or body contact. There is a similar absence of evidence of disorder or potential disorder by any onlookers.

The Supreme Court of South Carolina agreed that "The record discloses that none of the defendants committed any act of violence" (33a) but upheld the convictions on the ground of " . . . a clear and present danger of riot, disorder, interference with traffic . . . or other immediate threat to public peace" (34a). The finding of a clear and present danger was supported solely by the conclusion that "very high tension on the part of Negroes and whites, resulting from a series of demonstrations on the part of Negro students" (35a) existed in Orangeburg.

This "tension" was found in prior demonstrations against racial segregation, or "clashes" as the Supreme Court of South Carolina called them. The records reveal only that on February 25, 1960 students had picketed the Kress dime store in Orangeburg and no disturbance whatsoever had taken place (Gilchrist 12). On February 26 a white and a Negro had been arrested for a brief "fisticuff" during a demonstration at the Kress store (Fields 15; Gilchrist 12). This was the only evidence of violence of any kind which had taken place in Orangeburg. On March 1, 1960, six to seven hundred Negro students walked through town to express disapproval with the City's racial policies (Heatley 66). Two persons were arrested on that day "from incidents that happened during the parading" (*Ibid.*). Four boys were also arrested apparently for having had paper bags over their heads (*Ibid.*).

On the ground that these prior demonstrations had created "tensions" between the races, the police arrested petitioners on March 15, 1960. But these facts do not permit an inference of violence or threatened violence. All they may evidence is that the students' point of view was

not that of all others in the Orangeburg area. Such evidence is irrelevant to a justifiable basis for abridging freedom of expression. Petitioners cannot be convicted because their protected expression may have stirred passions in the community concerning issues of national importance, for such a result is the raison d'etre of freedom of expression.

Petitioners cannot be convicted on the totally unsubstantiated opinion of the police that disorder will occur. *Garner* v. *Louisiana*, 368 U. S. 157; *Thompson* v. *Louisville*, 362 U. S. 199; *Taylor* v. *Louisiana*, 7 L. ed. 2d 395. Absent some overt act of violence or threats of violence, the police opinion of possible disorder, on which the Supreme Court of South Carolina rested its affirmance of these convictions, finds no support in the records.

Nor is there evidence of traffic problems which prove the crime charged. There is no evidence that traffic problems "caused fear" or tended to "inciting a riot" as charged in the warrants. Such trivial interference with traffic on the streets of the City as these records show was caused by actions of the police. The few pedestrians who observed the demonstration were curious bystanders and were not impeded by the students.

Opinion of the Supreme Court of South Carolina
Filed June 6, 1962

IN THE SUPREME COURT OF SOUTH CAROLINA

THE STATE,

Respondent,

v.

ALVIN HEATLEY, et al.,

Appellants.

LEWIS, A. J.: These defendants, 47 in number, were tried by the Magistrate at Orangeburg, South Carolina, without a jury, and found guilty of the offense of breach of the peace. They have appealed and charge error on the part of the trial court (1) in refusing to dismiss the warrant issued against them on the grounds that the information upon which the warrant was issued failed to fully set forth the crime charged, and (2) in refusing to sustain their contention that the State failed to prove the commission by them of the offense of breach of the peace. Under basically the same facts, the identical issues were presented in the case of The State v. Irene Brown, et al. and decided adversely to the contentions of these defendants. The decision in that case, which is being filed simultaneously herewith, is controlling here and requires affirmance of the judgment of the lower court.

Affirmed.

TAYLOR, *C.J.*, MOSS, BUSSEY and BRAILSFORD, *JJ.*, concur.

Order of the Orangeburg County Court
Filed December 5, 1961

The State v. Joseph C. Brown et al.

ORDER

The appeals herein are from convictions in the Court of Magistrate, Honorable D. Marchant Culler, Orangeburg County Magistrate, presiding, upon a charge of the common law crime of breach of the peace. The defendants herein were tried jointly, and the trial was one of eight such trials, wherein various groups were tried for the offense stated after certain incidents which arose in the City of Orangeburg on March 15, 1960. Approximately 350 persons were arrested as a result of the incident referred to, and, for the sake of convenience, they were divided into eight groups for trial.

All exceptions have been duly considered. The issues raised have been disposed of by the Orders of this Court in the cases of *State* v. *Irene Brown, et al., State* v. *James Fields, et al., State* v. *Bobby J. Gilchrist, et al.,* and *State* v. *Marie Graham; et al.,* which Orders are herewith incorporated as a part of this Order.

All exceptions of the Appellants are overruled and the convictions and sentences are affirmed.

s/ JAMES B. PRUITT,
Presiding Judge,
First Judicial Circuit.

December 5, 1961.

III

Petitioners' Convictions Were Obtained in Violation of Their Rights to Freedom of Speech and Assembly in That They Were Convicted of Breach of the Peace Without Proof of a Substantial Evil That Rises Far Above Public Inconvenience, Annoyance, and Unrest and Without Proof of a Clear and Present Danger That Serious Injury to the State Would Occur.

Petitioners have argued that these records are barren of any evidence of conduct which threatened violence or disorder. But even if this Court should hold that the evidence is sufficient to overcome the rule of *Thompson* v. *Louisville*, 362 U. S. 199; *Garner* v. *Louisiana*, 368 U. S. 157 and *Taylor* v. *Louisiana*, 7 L. ed. 2d 395, such a determination still does not repair the flaw in these convictions. For the students were arrested and convicted below for conduct arising out of exercise of their rights to free expression without the necessary showing of a substantial evil that rises far above public inconvenience, annoyance, and unrest and a clear and present danger that that evil will occur, *Cantwell* v. *Connecticut*, 310 U. S. 296, 311.

Mr. Justice Brandeis has written, *Whitney* v. *California*, 274 U. S. 357, 378 (concurring opinion) that actual disorder is not always ground for abridging freedom of speech and assembly:

> "... the fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech and assembly."

The convictions of these students were upheld below on the ground that "there existed in the Orangeburg area very high tension on the part of Negroes and Whites . . . " (35a). The Supreme Court of South Carolina agreed, however, that the students were completely peaceful (33a). As no violence occurred or was actually threatened, the opinion of the Supreme Court of South Carolina must be read as justifying criminal conviction of those peacefully taking advantage of the right to free speech and expression on the ground that disorder may occur on the part of others opposed to the views expressed. Such a conclusion finds no support in the opinions of this court.

Community opposition has never been a ground sufficient to support abridgement of constitutional rights. *Cooper* v. *Aaron*, 358 U. S. 1, 16. This Court has found the interests of the State insufficient to justify restriction of freedom of speech and assembly in circumstances at least as "tense" as shown here. *Terminiello* v. *Chicago*, 337 U. S. 1. Cf. *Sellers* v. *Johnson*, 163 F. 2d 877 (8th Cir. 1947), cert. den. 332 U. S. 851; *Rockwell* v. *Morris*, 10 N. Y. 2d 721 (1961), cert. den. 7 L. ed. 2d 131. In the cases of these students there is no indication of imminent violence as in *Feiner* v. *New York*, 340 U. S. 315, 317, 318, where a "pushing, milling and shoving crowd" was "moving forward," and where the speaker had passed the bounds of argument.

The right to assemble peacefully to express frustration with attempts to limit free expression and dissatisfaction with a City's racial policies must encompass security against being assaulted for having exercised it. The reasoning of the South Carolina Supreme Court, in accepting community hostility as a justification for limiting peaceful expression, makes the salutary function of the First and Fourteenth Amendments depend upon the unlawful conduct of those opposed to the views expressed. Such a

result would only serve to provoke threats of unlawful and violent opposition as a convenient method to silence minority expression. Ironically, those minority groups whose need for protection of the First and Fourteenth Amendments is greatest would be denied it most readily.

The duty of the State is to provide protection for freedom of expression not suppress it at the first remote threat of disorder. *Hague* v. *C. I. O.*, 307 U. S. 496, 516; *Sellers* v. *Johnson*, 163 F. 2d 877, 881, cert. den. 332 U. S. 851. Cf. *Robeson* v. *Fanelli*, 94 F. Supp. 62, 69, 70 (S. D. N. Y. 1950). If this is the duty of the police when there has been violence or it is imminent, it must *a fortiori* be the duty of the police when fears of violence are predicated solely on apprehensions of community hostility rather than overt unlawful conduct.

Nor can the police seize upon traffic adjustment as a basis for suppressing freedom of expression. *Cantwell* v. *Connecticut*, 310 U. S. 307, 308. The minor inconveniences of traffic control shown by these records cannot be enlarged into a justification for abridging the freedom of expression so fundamental to the health of the democratic process. Petitioners have not been convicted pursuant to a statute evincing a legislative judgment that their expression should be limited to the interests of some other societal value, but under a generalized concept of common law breach of the peace. *Cantwell* v. *Connecticut*, 310 U. S. 296, 307.

Here, as in *Cantwell*, there has been no such specific declaration of state policy which "would weigh heavily in any challenge of the law as infringing constitutional limitations." 310 U. S. at 308. The Supreme Court of South Carolina noted in affirming these convictions below that City officials had advised that no further marches or parades would be tolerated within the City without a per-

mit, but petitioners were not convicted under the specific provisions of a permit requirement. Rather, the State has chosen to charge the students under a general conception of breach of the peace which South Carolina has never heretofore applied to the interference with traffic. *State v. Edwards*, —— S. C. ——, 123 F. 2d 247, cert. granted May 14, 1962, in which the State Supreme Court did so for the first time was decided subsequent to petitioners' arrests and convictions here. In *Edwards* as in these cases the South Carolina Supreme Court adopted the general definition of breach of the peace found in 8 Am. Jur. 834, Sec. 3.[1] Neither in the Section of Am. Jur. cited or in reported South Carolina cases can petitioners find application of common law breach of the peace to the conduct of petitioners here.

In this regard, Mr. Justice Harlan's warning as to all-inclusive breach of the peace provisions in *Garner v. Louisiana*, 368 U. S. 157, is here relevant:

> "But when a State seeks to subject to criminal sanctions conduct which, except for a demonstrated paramount state interest, would be within the range of freedom of expression as assured by the Fourteenth Amendment, it cannot do so by means of a general and all-inclusive breach of the peace prohibition. It must bring the activity sought to be proscribed within the ambit of a statute or clause 'narrowly drawn to define

[1] "In general terms, a breach of the peace is a violation of public order, a disturbance of the public tranquility, by any act or conduct inciting the violence * * *, it includes any violation of any law enacted to preserve peace and good order. It may consist of any act of violence or an act likely to produce violence. It is not necessary that the peace be actually broken to lay the foundation for a prosecution for this offense. If what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required. Nor is actual personal violence an essential element in the offense" (33a).

and punish specific conduct as constituting a clear and present danger to a substantial interest of the State.'"

To convict petitioners because a by product of their expression was interference with traffic would be to open South Carolina's use of common law breach of the peace to the vice of vagueness. *Cantwell* v. *Connecticut*, 310 U. S. 296, 307, 308.

In the absence of a state statute, narrowly drawn, South Carolina cannot punish expression which only leads to minor interference with traffic. Petitioners' "communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render [them] liable to conviction of the common law offense in question." *Cantwell* v. *Connecticut*, 310 U. S. 296, 311; cf. *Thornhill* v. *Alabama*, 310 U. S. 88, 105, 106.

CONCLUSION

WHEREFORE, for the foregoing reasons, petitioners pray that the petition for writ of certiorari be granted.

Respectfully submitted,

JACK GREENBERG
CONSTANCE BAKER MOTLEY
MICHAEL MELTSNER
10 Columbus Circle
New York 19, New York

MATTHEW J. PERRY
LINCOLN C. JENKINS, JR.
1107½ Washington Street
Columbia 1, South Carolina

W. NEWTON POUGH
Orangeburg, South Carolina

Attorneys for Petitioners

APPENDIX

Order of the Orangeburg County Court Filed December 5, 1961

The State v. James Fields et al.

ORDER

The appeals herein are from convictions in the Court of Magistrate, Honorable D. Marchant Culler, Orangeburg County Magistrate, presiding, upon a charge of the common law crime of breach of the peace. The defendants herein were tried jointly, and the trial was one of eight such trials, wherein various groups were tried for the offense stated after certain incidents which arose in the City of Orangeburg on March 15, 1960. Approximately 350 persons were arrested as a result of the incident referred to, and, for the sake of convenience, they were divided into eight groups for trial.

Nearly all of the issues raised in these appeals have been disposed of by Order handed down this date in the case of the *State* v. *Irene Brown, et al.*, and the conclusions expressed in that Order are applicable to the questions here presented except as hereinafter detailed.

These appeals by Exception No. 2 allege that the trial conducted was not a public trial and was therefore in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. The basis for this allegation of error is that "the room or office in which the trial was had was so small and narrowly confined as to deny attendance at said trial of the relatives, friends and persons interested in the welfare of the defendants".

There is no merit in this contention. The Courtroom was admittedly small, being described by the presiding

Magistrate as approximately 15 by 30 feet. The Court takes judicial notice of the fact that this was the regular Courtroom of the presiding Magistrate for the hearing of all matters, and takes further notice that this is not an unusually small Courtroom as is customarily provided for Magistrates of South Carolina. Irrespective of this, the trial was in all respects a public trial and the allegations of error on this respect are totally without merit. 48 A. L. R. (2d) 1436. It is particularly noted that there is no showing that anyone was, in fact, excluded from attendance upon the trial. Consequently, there was no prejudice to any of the appellants.

Exception No. 8 of the appeals herein alleges error in declining to "expunge the testimony of the State's witnesses, such testimony having not identified any of these defendants as having committed any crime . . . ."

The testimony reveals that the participants in the demonstration leading to the arrest were taken to the City Jail, or to the jail yard of the County of Orangeburg, and thereafter all of the participants were taken to the County Courthouse and from the latter place to the Magistrate's office, where they gave bond. During this period all of the participants were under the surveillance and in the custody of police officers. While in custody they each executed bonds, which bonds were offered in evidence and admitted without objection, in the course of the trial. (Tr. pp. 79, 80, 95.) The two defendants who testified admitted participating as a group in the march. (Tr. pp. 147, 163.)

It appears clear that the defendants were identified as participants in the demonstration and this Exception is therefore overruled.

Order of Orangeburg County Court in The State v. James Fields, et al.

The Order of this Court in the case of *The State* v. *Irene Brown, et al.*, is hereby adopted as conclusive of the other exceptions raised in these appeals.

All other exceptions of the appellants are overruled and the convictions and sentences are affirmed.

/s/ JAMES B. PRUITT,

JAMES B. PRUITT,
Presiding Judge,
First Judicial Circuit.

December 5, 1961.

Opinion of the Supreme Court of South Carolina
Filed June 6, 1962

IN THE SUPREME COURT OF SOUTH CAROLINA

THE STATE,

Respondent,

v.

JAMES FIELDS, et al.,

Appellants.

Lewis, A. J.: These defendants, 22 in number, were tried by the Magistrate at Orangeburg, South Carolina, without a jury, and found guilty of the offense of breach of the peace. They have appealed and charge error on the part of the trial court (1) in refusing to dismiss the warrant issued against them on the grounds that the information upon which the warrant was issued failed to fully set forth the crime charged, and (2) in refusing to sustain their contention that the State failed to prove the commission by them of the offense of breach of the peace. Under basically the same facts, the identical issues were presented in the case of The State v. Irene Brown, et al. and decided adversely to the contentions of these defendants. The decision in that case, which is being filed simultaneously herewith, is controlling here and requires affirmance of the judgment of the lower court.

Affirmed.

TAYLOR, *C.J.*, MOSS, BUSSEY and BRAILSFORD, *JJ.*, concur.

Order of the Orangeburg County Court
Filed December 5, 1961

The State v. Bobbie J. Gilchrist

ORDER

The appeals herein are from convictions in the Court of Magistrate, Honorable D. Marchant Culler, Orangeburg County Magistrate, presiding, upon a charge of the common law crime of breach of the peace. The defendants herein were tried jointly, and the trial was one of eight such trials, wherein various groups were tried for the offense stated after certain incidents which arose in the City of Orangeburg on March 15, 1960. Approximately 350 persons were arrested as a result of the incident referred to, and, for the sake of convenience, they were divided into eight groups for trial.

In these appeals, by Exception No. 1, the defendants urge that the Court erred in allowing an amendment to the warrant after the case was called for trial.

The original warrant alleged that the defendants approached Lowman and Russell Streets which enter the business section of the City of Orangeburg and that the group was headed by one Daniel Blue. The amended warrant alleged that the defendants approached what is known as the business section of the City of Orangeburg, the groups being headed by a number of parties.

It is manifest that the amendment to the warrant was of slight significance and cannot in any manner be construed to have prejudiced the rights of these defendants. Section 43-112 of the 1952 Code of Laws allows an amendment of the information at any time before trial. See also *Town of Mayesville* v. *Clamp*, 149 S. C. 346, 147 S. E. 455. This exception is without merit.

Order of the Orangeburg County Court in The State v. Bobbie J. Gilchrist

The remaining exceptions are disposed of by the conclusions expressed in the Orders of the Court in the companion cases of *The State* v. *Irene Brown et al.*, and *The State* v. *James Fields et al.*, which Orders are incorporated herewith as a part of this Order.

All exceptions of the appellants are overruled and the convictions and sentences are affirmed.

s/ JAMES B. PRUITT,
Presiding Judge,
First Judicial Circuit.

December 5, 1961.

Opinion of the Supreme Court of South Carolina Filed June 6, 1962

IN THE SUPREME COURT OF SOUTH CAROLINA

THE STATE,

Respondent,

v.

BOBBIE J. GILCHRIST, *et al.*,

Appellants.

Lewis, A. J.: These defendants, 28 in number, were tried by the Magistrate at Orangeburg, South Carolina, without a jury, and found guilty of the offense of breach of the peace. They have appealed and charge error on the part of the trial court (1) in refusing to dismiss the warrant issued against them on the grounds that the information upon which the warrant was issued failed to fully set forth the crime charged, and (2) in refusing to sustain their contention that the State failed to prove the commission by them of the offense of breach of the peace. Under basically the same facts, the identical issues were presented in the case of The State v. Irene Brown, et al. and decided adversely to the contentions of these defendants. The decision in that case, which is being filed simultaneously herewith, is controlling here and requires affirmance of the judgment of the lower court.

Affirmed.

TAYLOR, *C.J.*; MOSS, BUSSEY and BRAILSFORD, *JJ.*, concur.

Order of the Orangeburg County Court
Filed December 5, 1961

The State v. Marie Graham, et al.

ORDER

The appeals herein are from convictions in the Court of Magistrate, Honorable D. Marchant Culler, Orangeburg County Magistrate, presiding, upon a charge of the common law crime of breach of the peace. The defendants herein were tried jointly, and the trial was one of eight such trials, wherein various groups were tried for the offense stated after certain incidents which arose in the City of Orangeburg on March 15, 1960. Approximately 350 persons were arrested as a result of the incident referred to, and, for the sake of convenience, they were divided into eight groups for trial.

Exception No. 2 alleges error of the Court "in permitting the State's witnesses * * * to testify to 'clear and present danger.'"

The precise testimony complained of is not detailed. It appears manifest, however, from a reading of the record stipulated as controlling in these cases, that the testimony of the witnesses for the State as to the circumstances which existed prior to and at the time of the demonstration which led to the arrests bore directly upon the issue of whether a breach of the peace was imminent. Such testimony was therefore clearly relevant as pointedly indicated in *People v. Feiner*, 300 N. Y. 391, 91 N. E. (2d) 319, upheld by the United States Supreme Court, 340 U. S. 315, 95 L. Ed. 295. An act which is lawful in some circumstances may be unlawful in others and testimony of the State's witnesses which tended to establish the tensions and emotions existing in the community was clearly admissible. The Exception made

is most gereral in nature, no specific testimony has been called to the attention of the Court as objectionable, and a study of the record by the Court fails to reveal any testimony which may come within the scope of this general exception and the same is overruled.

All other exceptions have been duly considered and found to be controlled by the Order of this Court in the companion cases of *State* v. *Irene Brown, et al.*, *State* v. *James Fields, et al.*, and *State* v. *Bobby J. Gilchrist, et al.*, which Orders are hereby incorporated herein.

All exceptions of the appellants are overruled and the convictions and sentences are affirmed.

s/ JAMES B. PRUITT,
Presiding Judge,
First Judicial Circuit.

December 5, 1961.

Opinion of the Supreme Court of South Carolina
Filed June 6, 1962

IN THE SUPREME COURT OF SOUTH CAROLINA

THE STATE,

Respondent,

v.

MARIE GRAHAM, *et al.*,

Appellants.

Lewis, A. J.: These defendants, 91 in number, were tried by the Magistrate at Orangeburg, South Carolina, without a jury, and found guilty of the offense of breach of the peace. They have appealed and charge error on the part of the trial court (1) in refusing to dismiss the warrant issued against them on the grounds that the information upon which the warrant was issued failed to fully set forth the crime charged, and (2) in refusing to sustain their contention that the State failed to prove the commission by them of the offense of breach of the peace. Under basically the same facts, the identical issues were presented in the case of The State v. Irene Brown, et al. and decided adversely to the contentions of these defendants. The decision in that case, which is being filed simultaneously herewith, is controlling here and requires affirmance of the judgment of the lower court.

Affirmed.

TAYLOR, *C.J.*, MOSS, BUSSEY and BRAILSFORD, *JJ.*, concur.

Order of the Orangeburg County Court
Filed December 5, 1961

The State v. Eula M, Witherspoon, et al.

ORDER

The appeals herein are from convictions in the Court of Magistrate, Honorable D. Marchant Culler, Orangeburg County Magistrate, presiding, upon a charge of the common law crime of breach of the peace. The defendants herein were tried jointly, and the trial was one of eight such trials, wherein various groups were tried for the offense stated after certain incidents which arose in the City of Orangeburg on March 15, 1960. Approximately 350 persons were arrested as a result of the incident referred to, and, for the sake of convenience, they were divided into eight groups for trial.

Exception No. 4 alleges error in not permitting a State's witness to "be questioned relative to the source of his authority to stop the peaceful demonstration of the defendants and to arrest them". This has apparent reference to the testimony of the witness Morrison W. Whetstone, Captain, Orangeburg City Police Department. On cross examination Captain Whetstone testified that he had asked a group of the defendants, who were marching in column, to stop. He was asked "* * * what authority were you acting pursuant to?". The following is taken from the Transcript of testimony, page 19:

> "A. As my duties as a police officer to preserve peace and order.
>
> Q. I understand that, but isn't it a fact, Captain Whetstone, that most police activity is done pursuant to some ordinance or statute?
>
> A. That's correct.

Q. Then what ordinance or statute were you acting pursuant to?

A. I believe this is taken from the State statute.

Q. You were not acting pursuant to any Orangeburg municipal ordinance?

A. No, sir."

The testimony sought to be elicited was clearly a matter of law and not within the proper scope of examination. It had no bearing upon the guilt or innocence of these defendants and it is not apparent how in any manner it could have enlightened the Court thereabout. No showing of prejudice to any defendant is made. This Exception is therefore overruled.

All other exceptions have been duly considered and are hereby overruled. Most, if not all, of the exceptions are controlled by the Orders of this Court in the parallel cases of *State* v. *Irene Brown et al.; State* v. *James Fields et al.; State* v. *Bobby J. Gilchrist et al.;* and *State* v. *Marie Graham et al.*, which Orders are hereby incorporated herein.

All exceptions of the appellants are overruled and the convictions and sentences are affirmed.

s/ JAMES B. PRUITT,
Presiding Judge,
First Judicial Circuit.

December 5, 1961.

Opinion of the Supreme Court of South Carolina
Filed June 6, 1962

IN THE SUPREME COURT OF SOUTH CAROLINA

THE STATE,

Respondent,

v.

EULA M. WITHERSPOON, ET AL.,

Appellants.

LEWIS, A. J.: These defendants, 50 in number, were tried by the Magistrate at Orangeburg, South Carolina, without a jury, and found guilty of the offense of breach of the peace. They have appealed and charge error on the part of the trial court (1) in refusing to dismiss the warrant issued against them on the grounds that the information upon which the warrant was issued failed to fully set forth the crime charged, and (2) in refusing to sustain their contention that the State failed to prove the commission by them of the offense of breach of the peace. Under basically the same facts, the identical issues were presented in the case of The State v. Irene Brown, et al. and decided adversely to the contentions of these defendants. The decision in that case, which is being filed simultaneously herewith, is controlling here and requires affirmance of the judgment of the lower court.

Affirmed.

TAYLOR, *C.J.*, MOSS, BUSSEY and BRAILSFORD, *JJ.*, concur.

Order of the Orangeburg County Court
Filed December 5, 1961

The State v. Alvin Heatley, et al.

ORDER

The appeals herein are from convictions in the Court of Magistrate, Honorable D. Marchant Culler, Orangeburg County Magistrate, presiding, upon a charge of the common law crime of breach of the peace. The defendants herein were tried jointly, and the trial was one of eight such trials, wherein various groups were tried for the offense stated after certain incidents which arose in the City of Orangeburg on March 15, 1960. Approximately 350 persons were arrested as a result of the incident referred to, and, for the sake of convenience, they were divided into eight groups for trial.

All exceptions have been duly considered. The issues raised have been disposed of by the Orders of this Court in the cases of *State* v. *Irene Brown, et al., State* v. *James Fields, et al., State* v. *Bobby J. Gilchrist, et al., State* v. *Marie Graham, et al.,* and *State* v. *Eula M. Witherspoon, et al., which Orders are herewith incorporated as a part of the Order.*

All exceptions of the appellants are over-ruled and the convictions and sentences are affirmed.

s/ JAMES B. PRUITT,
Presiding Judge,
First Judicial Circuit.

December 5, 1961.

Opinion of the Supreme Court of South Carolina Filed June 6, 1962

IN THE SUPREME COURT OF SOUTH CAROLINA

THE STATE,

Respondent,

v.

JOSEPH C. BROWN, et al.,

Appellants.

LEWIS, A.J.: These defendants, 50 in number, were tried by the Magistrate at Orangeburg, South Carolina, without a jury, and found guilty of the offense of breach of the peace. They have appealed and charge error on the part of the trial court (1) in refusing to dismiss the warrant issued against them on the grounds that the information upon which the warrant was issued failed to fully set forth the crime charged, and (2) in refusing to sustain their contention that the State failed to prove the commission by them of the offense of breach of the peace. Under basically the same facts, the identical issues were presented in the case of The State v. Irene Brown, et al. and decided adversely to the contentions of these defendants. The decision in that case, which is being filed simultaneously herewith, is controlling here and requires affirmance of the judgment of the lower court.

Affirmed.

TAYLOR, *C.J.*, MOSS, BUSSEY and BRAILSFORD, *JJ.*, concur.

Order of the Orangeburg County Court
Filed December 5, 1961

The State v. Frances E. Davenport, et al.

ORDER

The appeals herein are from convictions in the Court of Magistrate, Honorable D. Marchant Culler, Orangeburg County Magistrate, presiding, upon a charge of the common law crime of breach of the peace. The defendants herein were tried jointly, and the trial was one of eight such trials, wherein various groups were tried for the offense stated after certain incidents which arose in the City of Orangeburg on March 15, 1960. Approximately 350 persons were arrested as a result of the incident referred to, and, for the sake of convenience, they were divided into eight groups for trial.

All exceptions have been duly considered. The issues raised have been disposed of by the Orders of this Court in the cases of *State* v. *Irene Brown, et al.*, *State* v. *James Fields, et al.*, *State* v. *Bobby J. Gilchrist, et al.*, *State* v. *Marie Graham, et al.*, and *State* v. *Eula Witherspoon, et al.*, which Orders are herewith incorporated as a part of this Order.

All exceptions of the appellants are overruled and the convictions and sentences are affirmed.

s/ James B. Pruitt,
Presiding Judge,
First Judicial Circuit.

December 5, 1961

Opinion of the Supreme Court of South Carolina Filed June 6, 1962

IN THE SUPREME COURT OF SOUTH CAROLINA

THE STATE,

Respondent,

v.

FRANCES E. DAVENPORT ET AL.,

Appellants.

Lewis, A. J.: These defendants, 46 in number, were tried by the Magistrate at Orangeburg, South Carolina, without a jury, and found guilty of the offense of breach of the peace. They have appealed and charge error on the part of the trial court (1) in refusing to dismiss the warrant issued against them on the grounds that the information upon which the warrant was issued failed to fully set forth the crime charged, and (2) in refusing to sustain their contention that the State failed to prove the commission by them of the offense of breach of the peace. Under basically the same facts, the identical issues were presented in the case of The State v. Irene Brown, et al. and decided adversely to the contentions of these defendants. The decision in that case, which is being filed simultaneously herewith, is controlling here and requires affirmance of the judgment of the lower court.

Affirmed.

TAYLOR, *C.J.*, MOSS, BUSSEY and BRAILSFORD, *JJ.*, concur.

Order of the Orangeburg County Court
Filed December 5, 1961

The State v. Irene Brown, et al.

ORDER

This is an appeal from conviction by a jury in the Court of Honorable D. Marchant Culler, Orangeburg County Magistrate, upon a charge of the common law crime of breach of the peace. There are fifteen defendants who were convicted at a trial held in Orangeburg on March 16, 17, 18 and 19, 1960. Upon convictions, they were given an alternative sentence of $50.00 fine or 30 days imprisonment. Timely notice of appeal to this Court was given and arguments were heard by me in open court. Counsel for the State and for the Defendants have both filed briefs.

Appellants were part of a group of nearly three hundred students who left the campus of Claflin University in the City of Orangeburg on March 15, 1960 at approximately midday to proceed to the main business section of the city. The announced purpose as developed during the course of the trial was that these Defendants were proceeding for the purpose of expressing grievances and to petition officials of the city, county and state governments for redress of grievances. This purpose is contained in a so-called plea to the information which the Defendants made. There was no evidence adduced to show that there was any official of the State government present in the City of Orangeburg on that day. No audience had been sought by any of the Defendants with any official of the City or County of Orangeburg.

The testimony shows that a large group of these students appeared on the date stated, going west on East Russell Street in the City of Orangeburg and were met there by

Chief of Police Hall and other officers. They were requested by these officials to return to their school and they refused to do so. Testimony is contained in the record that traffic was blocked, streets were cluttered and a large crowd of citizens were gathering at this location.

There is further testimony that another large group appeared going west on East Amelia Street in the direction of the main business district. This group also refused to turn back when requested to do so. Upon the refusal of the Defendants to return to their campus, some two hundred and eighty-eight were arrested, charged with breach of the peace and confined in the city and county jails in Orangeburg.

All Defendants were released on bond before the day was over and the fifteen who compose the Appellants here were called to trial on March 16, 1960 and convicted by jury as heretofore set forth.

Appellants excepted to the verdict and judgment of conviction upon eight specifically stated grounds and one general ground reserving as an exception any error which might be disclosed by the record. The eight specific grounds will be considered and disposed of in order.

The first exception relates to the denial of various motions for a continuance made prior to the commencement of the trial. No showing is made that this denial of a continuance has injured the Appellants in any way. This is a misdemeanor charge and there is no showing that Defendants were prejudiced. Under the well-settled rule of this State, the granting of a continuance is within the discretion of the trial judge. I find no abuse of discretion and, therefore, no error. See *State* v. *Livingston*, 223 S. C. 1, 73 S. E. (2d) 850.

Order of the Orangeburg County Court in The State v. Irene Brown, et al.

The second exception concerns the denial of a motion for severance and separate trials for the Defendants. It is again well settled under the law of this State that the severance of Defendants is a matter for the discretion of the trial judge. *State* v. *Britt; et al.*, 237 S. C. 293, 117 S. E. (2d) 371.

The record reveals that previous demonstrations had caused such a feeling of apprehension on the part of the police officers of the City of Orangeburg that additional officers had been procured to prevent and control any outbreak of disorder or violence. The record amply substantiates the position taken by the officials of the City of Orangeburg that the appearance of large groups of persons marching along the streets would most probably result in serious disturbances. The apprehension entertained by these officials was fully justified. Traffic conditions were impeded to such an extent that one of the officers testified that persons walking upon the sidewalks were compelled to take refuge in places of business. In these circumstances, the action of the police officials in moving quickly to avoid a clear and present danger to the public order was fully warranted.

Exception number three is from the denial of a motion to quash the information and to dismiss the warrant. An examination of the warrant which is before me shows that it plainly and substantially sets forth the charge of breach of the peace. There was no error in the refusal of a motion to quash and dismiss. *Duffie* v. *Edwards*, 185 S. C. 91, 193 S. E. 211.

Exception number four is from a denial of a motion to request the jurors to submit to a *voir dire* examination. It

appears from the record that the selection of a jury in this case was made strictly in accordance with the provisions of Section 43-116 of the 1952 Code of Laws of South Carolina. That section makes no provision for the placing of Magistrate's Court jurors on their *voir dire* examination.

The contention that *voir dire* examination is a matter of right in the Magistrate's Court is a novel one in this State. It is well settled that the requirements of due process in Magistrate's Courts are satisfied by a summary trial held in a fair and just manner. *State v. Randolph, et al.*, filed August 23, 1961. Section 38-3 of the 1952 Code of Laws of South Carolina recites that nothing contained in the provisions of the Code relating to juries and jurors in Circuit Courts shall affect the power and duty of Magistrates "to summon and empanel jurors when authorized by code provisions of law." Since Section 43-116 is an entirely separate provision and relates only to Magistrate's Court and contains no provision for *voir dire* examination, I am of the opinion that such examination is not allowable. See *Schnell* v. *State*, 17 S. E. 966, 92 Ga. 459.

Having concluded that there is no such right in the Courts of Magistrate, I find that it was, therefore, not error to deny the motion. Moreover, the transcript of the trial shows that Appellants did not use any of the ten peremptory challenges which were allowed them, and made no complaint that the jury was biased or otherwise disqualified in any respect. *State v. Gantt*, 223 S. C. 431, 75 S. E. (2d) 674. No showing whatever of any prejudice to the Appellants has been made.

The fifth exception relates to a challenge to the array of the jury panel on the grounds that Negroes were systematically excluded therefrom. This exception is patently

untenable inasmuch as it is undisputed that a Negro was a member of the trial jury.

The sixth exception relates to the refusal to permit cross examination of the Chief of Police of Orangeburg with respect to his personal views as to the efforts of members of the colored race to obtain service at lunch counters at which white persons are normally and customarily served. The question was raised, purportedly, for the purpose of showing bias and prejudice on the part of the witness. The issue of whether colored persons and white persons should be seated and be served at the same time at lunch counters was not a matter which related in any degree to the prosecution. At best, such testimony would only remotely relate to any bias or prejudice on the part of the witness testifying and the rejection of such irrelevant and collateral matter rested within the discretion of the trial court and I do not find any abuse of such discretion. 98 C. J. S., Witnesses, paragraphs 559, 560. Cf. *State* v. *Brooks*, 235 S. C. 344, 111 S. E. (2d) 686.

Exception number seven relates to the denial of a motion to strike the testimony of the Chief of Police of Orangeburg relating to previous existing tensions in the community, upon the ground that such testimony was never in fact linked to these particular Defendants. Such testimony was relevant and admissible, even if not connected to these Defendants, because it tended to show the state of the feelings, emotions and undercurrents of tension existing in the community, upon which the arresting officers relied in exercising their judgment to make the arrests in these cases. There is no error here.

Exception number eight is from the denial of motions for a directed verdict, for a new trial and for arrest of

judgment. There was ample testimony and evidence to sustain these particular denials at the stage of the trial wherein each was made, and there was, accordingly, no error in the denial thereof. See *State* v. *Langston*, 195 S. C. 190, 11 S. E. (2d) 1.

Exception number nine relates to a general reservation of any and all rights asserted at the trial on behalf of these defendants. It was urged in the arguments before me and in the brief submitted by the Appellants that they had a constitutional right to engage in the activities for which they were arrested, regardless of any peril to the community which might result therefrom. The relevant constitutional provisions are asserted as the Thirteenth and Fourteenth Amendments to the Constitution of the United States and Article V of the Constitution of South Carolina.

In connection therewith is the case of *People* v. *Feiner*, 300 N. Y. 391, 91 N. E. (2d) 319. In that case the Court of Appeals of the State of New York wrote an exhaustive opinion in a case which arose in that State in 1950, the factual situation being similar in many respects to the cases presently before this Court upon appeal.

Feiner, a University student, stationed himself upon one of the city streets of the City of Syracuse and proceeded to address his remarks to all those who would listen. The general tenor of his talk was designed to arouse Negro people to fight for equal rights, which he told them they did not have. Crowds attracted by Feiner began to fill up the sidewalks and overflow into the street. There was no disorder, but in the opinion of police authorities there was real danger of a disturbance of public order or breach of the peace. Feiner was requested by police to desist. He refused. The arrest was then made and Feiner was charged and convicted of disorderly conduct.

Order of the Orangeburg County Court in The State v. Irene Brown, et al.

In upholding the conviction, the New York Court quoted from *Cantwell v. State of Connecticut*, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, 128 A. L. R. 1352, said:

> "The offense known as breach of the peace embrace a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts, but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets or other immediate threat to public safety, peace or order appears, the power of the State to prevent or punish is obvious."

The appellants in the present case have emphasized repeatedly in the trials and in their arguments before the Court and in their Brief that no one of them individually committed any single act which was a violation of law. It is their contention that they had a right to assemble and act as they did so long as they did no other act which was in itself unlawful. Apparently they reject the proposition that an act which is lawful in some circumstances might be unlawful in others. The New York Court in answering a similar contention made by the defendant in the *Feiner case* said:

> "We are well aware of the caution with which the courts should proceed in these matters. The intolerance of a hostile audience may not in the nam of order be permitted to silence unpopular opinions. The Constitution does not discriminate between those whose ideas are popular and those whose beliefs arouse opposition

or dislike or hated—guaranteeing the right of freedom of speech to the former and withholding it from the latter. We recognize, however, that the State must protect and preserve its existence and unfortunate as it may be, the hostility and intolerance of street audiences and the substantive evils which may follow therefrom are practical facts of which the Courts and the law enforcement officers of the State must take notice. Where, as here, we have a combination of an aroused audience divided into hostile camps, an interference with traffic and a speaker who is deliberately agitating and goading the crowd and the police officers to action, we think a proper case has been made out under our State and Federal Constitutions for punishment."

In the case before the Court, Appellants were given every opportunity to avoid being arrested. No action was taken until the police authorities in their considered judgment came to the conclusion that the point had been reached where the action of the Appellants was dangerous to the peace of the community. There is no indication whatever in this case that the acts of the police officers were taken as a subtefuge or excuse for the suppression of the Appellants' views and opinions. The evidence is clear that the officers were motivated solely by a proper concern for the preservation of order and the protection of the general welfare in the face of an actual interference with traffic, and an imminently threatened disturbance of the peace of the community.

The State of South Carolina, the City of Orangeburg, and the County of Orangeburg, in the exercise of their general police powers, of necessity have the authority to

act in situations such as are detailed in the evidence in these cases and the conduct of this duly appointed officers of the law was not arbitrary, capricious or the result of prejudice, but was founded upon clear, convincing and common sense reasoning in an effort to preserve the public peace, safety and good order.

All exceptions of the Appellants are overruled and the convictions and sentences are affirmed.

s/. JAMES B. PRUITT,
Presiding Judge,
First Judicial Circuit.

December 5, 1961.

Opinion of the Supreme Court of South Carolina

Filed June 6, 1962

IN THE SUPREME COURT OF SOUTH CAROLINA

THE STATE,

Respondent,

v.

IRENE BROWN, *et al.*,

Appellants.

LEWIS, *A.J.*:

On March 15, 1960, 349 Negro students were arrested in the City of Orangeburg, South Carolina, and charged with the crime of breach of the peace. All were subsequently convicted in Magistrate's Court and sentenced to pay fines of Fifty ($50.00) Dollars or serve thirty (30) days in jail. All have appealed and, since they were charged in eight separate groups and each group tried separately, there are eight cases on appeal. However, because all of the cases involve basically the same issues and facts, they were consolidated for argument. The appeal in this case involves a group of fifteen defendants who were tried and convicted before the Magistrate and a jury, all of the remaining cases being tried before the Magistrate without a jury.

At the outset of their trials the defendants moved to dismiss the warrants against them on the ground that the information upon which the warrants were issued failed to fully set forth the crime charged. The motions were refused

and such is the basis for one of the exceptions on appeal.

There can be no doubt that a person charged with a criminal offense has a constitutional right to be fully informed of the nature and cause of the offense with which he is charged, Article 1, Section 18 of the Constitution of South Carolina, and that the information upon which a prosecution is commenced in Magistrate's Court must so allege. State v. Randolph, 239 S. C. 79, 121 S. E. (2d) 349. The question here is whether the warrants meet these requirements.

The warrants charged that the defendants "did commit breach of the peace by unlawfully and wilfully congregating and marching in the City of Orangeburg, said County, and did approach what is known as the business section of the City of Orangeburg, the groups being headed by a number of parties who refused to stop and return to the colleges upon the request of Chief of Police Hall and other officers in the City of Orangeburg, thereby disturbing the peace and tranquility of the normal traffic on the sidewalks as well as the streets in the City of Orangeburg, which caused fear and tending to incite a riot or other disorderly conduct or cause serious trouble."

We have recently had occasion to review the elements necessary to constitute the offense of breach of the peace in the case of The State v. Edwards, et al., —— S. C. ——, 123 S. E. (2d) 247. The foregoing warrants plainly and substantially charged, under our decisions, the crime of breach of the peace, fully informing the defendants of the nature and cause of the offense charged. The lower court properly refused to dismiss the warrants.

The defendants next assert that the State failed to prove the commission by them of the offense of breach of the

peace and that their convictions were obtained in violation of their rights to freedom of speech and assembly and their right to petition for redress of grievances, protected by Article 1, Sections 4 and 5, Constitution of South Carolina, and the First and Fourteenth Amendments to the United States Constitution. All of these questions may be resolved by a determination of whether or not there is any competent evidence to sustain the conviction of the defendants for a breach of the peace.

The Orangeburg area, according to the testimony, has a population of approximately twenty thousand. Claflin College and the South Carolina State College are located in Orangeburg, both attended solely by Negro students. It appears that, beginning about February 25, 1960, there began a series of demonstrations by the Negro students in the Orangeburg area in protest against racial segregation. On February 25, 1960, a group picketed in front of Kress' Store in the main business section of the City. On February 26, 1960 a larger group staged a "sit in" in Kress' Store. On March 1, 1960 there was a parade through the City by 600 to 700 Negro students.

As a result of these demonstrations the officers testified that very high tension and feeling was created among both the White and Negro races in the community. Two or three clashes between Negroes and Whites had occurred, resulting in arrests. In their efforts to maintain order among the citizens of the community, the City officials called to their assistance State law enforcement officers, the Mayor of the City publicly advised that no further marches or parades would be tolerated within the City without a permit, and a notice was read at the assembly hour at the South Carolina State College on March 2, 1960 informing the students that,

before further parades or marches downtown, the City authorities would require that a permit be obtained.

Under the foregoing circumstances and without notice to the City officials, three groups of Negro students, totaling approximately one thousand, left the campuses of the aforementioned colleges about 12 o'clock in the day of March 15, 1960 and proceeded to march, two abreast, along the sidewalks toward the main business section of the City of Orangeburg, each of the three groups taking a different route. The purpose of the procession of students, as testified by some of the defendants during the trial, was to petition the City officials of Orangeburg for redress of grievances in allegedly denying to them the right of peaceful assembly and of freedom of speech. However, no audience had been sought, or apparently intended, with any official of the City, County or State government. They planned to proceed to the City Square where they would sing The Star Spangled Banner and pray, after which they would return to their respective campuses. The procession of students, under the State's testimony, blocked traffic, streets were cluttered, and the sidewalks were blocked to such an extent as to require pedestrian traffic to enter business establishments to get off the street. As the students proceeded toward the main business section of the City, the officers intercepted each group. They were in each instance asked by the officers to disperse and return to their schools. Some of the students acceded to the requests of the officers and others refused, persisting in continuing the march. The refusal to disperse in obedience to the command of the officers resulted in the arrest of the defendants and the issuance of warrants charging them with the offense of breach of the peace.

The record discloses that none of the defendants committed any act of violence. It is their basic contention that they had a right to assemble and act as they did, so long as they did no other act which was in itself unlawful.

In State v. Edwards, et al., supra, —— S. C. ——, 123 S. E. (2d) 247, the following definition of breach of the peace, from 8 Am. Jur. 834, Section 3, was approved: "In general terms, a breach of the peace is a violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence * * *, it includes any violation of any law enacted to preserve peace and good order. It may consist of any act of violence or an act likely to produce violence. It is not necessary that the peace be actually broken to lay the foundation for a prosecution for this offense. If what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required. Nor is actual personal violence an essential element in the offense." And, in Cantwell v. Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, 1220, 128 A. L. R. 1352, the United States Supreme Court in discussing the conflict between the assertion of constitutional rights by the individual and the power of the State to punish for breach of the peace stated: "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other in-

mediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious."

The defendants have the constitutional right to freedom of speech, assembly and to petition for redress of grievances. The fact that the defendants may have been at the time of their arrests attempting to assert such constitutional rights does not answer the question here. While the state must safeguard the constitutional rights of the defendants, it also has a duty to preserve the public peace and to assure the availability of the streets to serve the necessary requirements of the community. The constitutional guarantees which, admittedly, the defendants have a right to enjoy may not be asserted in any manner, regardless of any resulting peril to the community therefrom. The constitutional principles here invoked do not prohibit state action when a clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public peace or order appears.

The defendants were engaged at the time in expressing their opposition to racial segregation. The question of racial practices is a present and perplexing one, involving deep seated feelings and beliefs. Where issues are involved which so deeply affect the feelings and emotions of a people, incidents often precipitate open conflict which in other situations would go unnoticed. In urging the adoption of one's views it must be recognized that the constitutional right exists to oppose as well as to espouse a cause. It is clear, however, that unpopular views may not be silenced under the guise of the preservation of order. In the conflict of opposing ideas the rights of the contending factions must be balanced if the state is to exist and the constitutional rights of all preserved. Therefore, the principle

has become fixed that, in exercising the rights guaranteed under the Constitution, one may not commit a breach of the peace. This is not a denial of those rights but rather a recognition that they can only exist in an orderly society.

Regardless of the differences in opinion that may be held as to the justification for the feeling in the community, the fact remains that the record justified the finding, inherent in the verdict, that on the occasion in question there existed in the Orangeburg area very high tension on the part of both Negroes and Whites, resulting from a series of demonstrations on the part of the Negro students. There had been clashes resulting in arrests, between Negroes and Whites. These were realities which local officials had to recognize and in the light of which common prudence required that they act. The local officials sought to preserve the peace by public notices, by invoking a regulation against parades without a permit, and by bringing in additional officers. Heedless of the requests by the officials and in the face of the high tension between the races in the community, the Negro students, one thousand strong, on March 15, 1960, began a march by three different routes into the congested business area of the City. There is absent from this record any showing or intimation that, had the defendants applied to the City officials for a permit to parade or sought in advance an audience with such officials, so that adequate police protection could be afforded and traffic conditions safeguarded, such permit would not have been issued or audience granted. As stated by the Circuit Judge in affirming the convictions of the defendants: "No action was taken until the police authorities in their considered judgment came to the conclusion that the point had been reached where the action of the appellants was dangerous to the

peace of the community. There is no indication whatever in this case that the acts of the police officers were taken as a subterfuge or excuse for the suppression of the appellants' views and opinions. The evidence is clear that the officers were motivated solely by a proper concern for the preservation of order and the protection of the general welfare in the face of an actual interference with traffic, and an imminently threatened disturbance of the peace of the community."

The evidence amply sustains the conviction of the defendants of the offense of breach of the peace.

The remaining question to be decided concerns the refusal of the Magistrate to grant the defendants' motion for examination of the jurors on their voir dire. This question concerns only the fifteen defendants involved in this case as the defendants in the other cases on appeal were tried by the Magistrate without a jury. These defendants made timely motion that the prospective jurors be examined on their voir dire. The Magistrate denied the motion and made no examination to determine whether bias or prejudice existed on the part of any juror. The sole question presented, and to which we limit our determination, is whether error was committed in the absolute refusal to make any examination of the prospective jurors as to possible bias or prejudice, when such request was timely made.

Trial by a jury was demanded by these defendants in accordance with the provisions of Section 43-115 of the 1952 Code of Laws, and Article 1, Section 18 of the Constitution of this State guaranteed to them the right to a trial "by an impartial jury".

Examination of prospective jurors on their voir dire is a guaranty of the right of the parties to an impartial jury.

And, when timely request was made, it became the duty of the Magistrate to make reasonable inquiry of the jurors to determine whether bias or prejudice existed, to the end that the constitutional right of the litigants to a trial by an impartial jury could be secured.

The question here is not as to the exercise of the trial Court's discretion in determining the impartiality of a juror, but concerns the absolute denial of an inquiry, after request, into such matter. The refusal of the Magistrate to examine the jurors on their voir dire so affects substantial rights of the defendants as to require reversal of the judgment herein and the granting of a new trial on that ground to the fifteen defendants in this case.

Reversed and remanded for a new trial.

TAYLOR, *C.J.*, MOSS, BUSSEY and BRAILSFORD, *JJ.*, concur.